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Supreme Court, U.S.
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No. 00-1580

In The

Supreme Court of the United States

EWING B. GOURLEY and CAROL L. GOURLEY,

Petitioners,

v.

MARY BETH USERY, STEVEN USERY, and MARK GARDNER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners have been less than candid with this Court with respect to the procedural history of this case. The United States Court of Appeals for the Eighth Circuit, in *Usery II*, affirmed the judgment of the Bankruptcy Appellate Panel for the Eighth Circuit on November 22, 2000. Pet.App. H. (A-155). Petitioners then moved for rehearing or in the alternative for rehearing en banc which was denied on January 16, 2001. Pet.App. I. (A-157). Petitioner fails to inform this Court that three days later, on January 19, 2001, Petitioner filed a new lawsuit "Petition In Equity To Set Aside Judgment And For New Trial Based Upon Fraud Perpetrated Upon The Court" in the United States District Court for the Western District of Missouri. Resp.App. A (A-1).[1]

In paragraph 18 of their petition in equity, Petitioners represented to the district court that they had "no adequate remedy at law." Resp.App. A (A-8). Subsequent to the filing of the petition in equity, Petitioners filed the current Petition for Writ of Certiorari with this Court alleging that they were entitled to a legal remedy, review by writ of certiorari. Thus, Petitioners were attempting to obtain, simultaneously, a review of the same case by two separate courts, under mutually exclusive theories.

Not surprisingly, Petitioners did not disclose to the district court the filing of the Petition for Writ of Certiorari and did not disclose to this Court that they were

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[1] Respondents have included only the petition, as the exhibits to the petition are voluminous and immaterial to the issue for which the petition is being cited.

seeking review by the district court on the theory that they had no adequate remedy at law. In dismissing the petition in equity, the district court observed the lack of candor by the Petitioners:

> As to the former, the Court believes that the interests of candor, accuracy and completeness required Plaintiffs to mention the history subsequent to Judge Federman's decision, but the Court will not delve further into that matter at this juncture. Resp.App. B (A-9; A-11).

If Petitioners are to be taken at their word (representing to the district court that they had no adequate remedy at law) then it was, and is, an acknowledgment and admission that they had no basis upon which to seek review by certiorari. If they believed they were entitled to review by certiorari then they misrepresented the state of the case to the district court when they represented that they had no adequate remedy at law. In either case they were less than candid with both the district court and this Court.

REASONS FOR DENYING THE WRIT

Petitioners contend that this Court should grant certiorari because the lower court violated the law of the case doctrine. The basis for their claim is that only cash flow for the year 1987 should have been used in calculating damages, asserting that Judge Federman's use of cash flow figures for the years 1985 through 1988 for the purpose of determining valuation and damages, violated the mandate of the Eighth Circuit Court of Appeals in *Usery I*. Pet.App. C. (A-76). As will be demonstrated

Judge Federman did not violate the Eighth Circuit's mandate in *Usery I*.

In *Usery I*, the Eighth Circuit reversed Judge See, the original trial judge, due to numerous errors in the calculation of damages and remanded the case for a "new trial" on the issue of damages. Pet.App. C. (A-76).

Contrary to what Petitioners suggest, the Eighth Circuit in *Usery I* specifically addressed the fact that Judge See had, at the suggestion of Petitioners' own expert, used cash flow figures from 1985 through 1988 (excluding 1987) in calculating damages. Pet.App. C. (A-83). On appeal, in *Usery I*, the Userys advocated the use of the cash flow figures from each of the years 1985 through 1988. Thus a difference in opinion existed as to whether all four years (1985-1988) should be considered or whether only three years (1985-1988 excluding 1987) should be considered in computing damages. No one advocated or used just one year of cash flow. A second issue was whether the same capitalization rate had to be used in valuing the business based upon the actual and represented cash flows.

The Eighth Circuit found that Judge See's methodology was flawed because she used different capitalization rates for the cash flow as represented and the actual cash flow. Pet.App. C. (A-86). However the use of multiple years of cash flow as the appropriate methodology for computing damages was unchallenged (all parties and the court used multiple years) and the Eighth Circuit clearly adopted the use of multiple years of cash flow as

the appropriate methodology for valuation purposes.[2] Pet.App. C. (A-85-86).

In its opinion holding that the same capitalization rate had to be applied to the "actual" and "represented" cash flows for the years in question, the Eighth Circuit stated:

> On remand, the Bankruptcy Court must determine the difference between the actual value of the nursing homes and the value of the homes as represented, using the same capitalization rate for each part of the equation. In other words, the court must use the same process to calculate the valuation figures, changing only the cash-flow numbers. Because valuation is a subjective art, we are unable to make a specific finding as to damages on appeal, but we note that each of the illustrative calculations we have undertaken, including the example presented in the Userys' reply brief, has yielded benefit of the bargain damages of less than $600,000. (emphasis added). Pet.App. C. (A-86).

In reversing Judge See and in remanding for a new trial on the issue of damages the Eighth Circuit did not mandate the use of only three years of cash flow (1985

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[2] Petitioners seem to imply at page 6 of their petition that Judge Federman's pretrial order indicated he intended only to consider cash flow from 1987 to the exclusion of other years. Petitioners' current counsel was not the counsel of record at that time and thus did not attend that pretrial conference. However, it was clear from the conference that Judge Federman intended to include all relevant years in the damage calculation and that the capitalization rate he applied to 1987 would also be applied to those years.

through 1988 excluding 1987) as advocated by the Gourleys and as used by Judge See, nor did it mandate the use of each of all four years (1985 through 1988), as advocated by the Userys. The court did, however, specifically refer to the Userys' example which used all four years and may have tacitly endorsed the use of four years. (Id.). The Eighth Circuit noted that valuation is somewhat of a "subjective art" and remanded the case to the trial court to compute damages using the same capitalization rate for actual and represented cash flow leaving it to the court, on remand, to determine the specific years to be used. Pet.App. C. (A-86).

As a result, on remand, the trial court was free to use the three years advocated by the Gourleys or the four years advocated by the Userys, or some other combination of years. The only mandate was that the same capitalization rate be applied to both actual and represented cash flow. Thus, this is a case involving a question of fact, the appropriate number of years to be used in the damage calculation, and is therefore not the type of case for which this court typically grants certiorari.

In attempting to forge a basis for conflict between the Eighth Circuit's opinion in *Usery I* and Judge Federman's judgment, Petitioners have misrepresented both the underlying facts and the Eighth Circuit's opinion in *Usery I*. Petitioners state:

> It is uncontested that Judge See used the cash flow figure of $960,000 to determine damages

> and her use of $960,000 was not disturbed on appeal.[3]
>
> * * *
>
> However, the Bankruptcy Court did not use the figure of $960,000, but instead used a series of cash flow figures from various years which were never represented to the Gourleys, in direct violation of the Eighth Circuit's mandate that "the value of the homes as represented" should be used. (Cite omitted). By using figures other than $960,000, Judge Federman violated the law of the case doctrine, the result being that Judge Federman arrived at a damages figure dramatically lower than that determined by Judge See. Petitioners' Petition at page 9.

As noted above, it is clear from the record and the Eighth Circuit's opinion in *Usery I* that Judge See, in reliance on the Gourleys' own expert, used cash flow figures from the years 1985 through 1988 excluding only 1987. Pet.App. C. (A-83). In fact their contention is directly contradicted in their own petition at page 4 wherein they quote directly from the Eighth Circuit's opinion:

> In reaching this sum, she specifically *adopted the valuation of the business by Gourleys' expert,* who calculated that the actual value was $5,470,775.57, *based on the average cash flow for 1985, 1986 and 1988* divided by a capitalization rate of 16.9% for Ozark and 18.7% for Northside. Petitioners' Petition at page 4, citing the Eighth

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[3] Contrary to Petitioners' assertion, Judge See's judgment on the issue of damages was reversed and a new trial ordered. Pet.App. C. (A-76).

Circuit's opinion in *Usery I.* (emphasis added). Pet.App. G.(A-141).

Thus, the entire basis for Petitioners' petition (that the Eighth Circuit mandated the use of only the cash flow for 1987) is a misrepresentation not only of the facts underlying Judge See's judgment and the Eighth Circuit's opinion but also the opinion of the Eighth Circuit itself.

It should be noted that Judge Bowman, who wrote the opinion reversing Judge See in *Usery I*, was on the panel that affirmed the Bankruptcy Appellate Panel's opinion in *Usery II.* Pet.App. H (A-155). If he and the other members of the panel reviewing Judge Federman's judgment and the Bankruptcy Appellate Panel's decision in *Usery II* had felt that the mandate in *Usery I* had been violated, they would have taken appropriate action. However, it is clear that Judge Bowman and the rest of the panel were satisfied that the law of the case as set forth in Judge Bowman's first opinion had been followed. As a result, there is no basis for finding any violation of the Eighth Circuit's mandate in *Usery I.*

CONCLUSION

Contrary to Petitioners' assertions, the trial court in *Usery II* followed the Eighth Circuit's mandate in *Usery I* and thus there is no basis for review by this Court.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

Ewing B. Gourley, Carol L. Gourley, EBG Health Care III, Inc., EBG Health Care IV, Inc., Healthcare Retirement Village, Inc., Healthcare Laundry Services, Inc.	)	Case No. 01-0073-CV-W-6
Plaintiffs,	)	
v.	)	
Mark E. Gardner, Attorney (#26149), Serve At: c/o Carmichael, Gardner, Turner & Brown, P.C. 901 St. Louis, Suite 800 Springfield, MO 65806;	)	
Carmichael, Gardner, Turner & Brown, P.C., Serve At: 901 St. Louis, Suite 800 Springfield, MO 65806;	)	
Mary Beth Usery Serve At: 3974 E. Farm Road, 104, Springfield, MO 65803;	)	
Steve Usery Serve At: 1117 Townsend Rd., #5900 Jacksonville, FL 32211;	)	
Defendants.	)	

PETITION IN EQUITY TO SET ASIDE JUDGMENT AND FOR NEW TRIAL BASED UPON FRAUD PERPETRATED UPON THE COURT

(Filed Jan. 19, 2001)

COME NOW Plaintiffs, and for their cause of action, herewith state to the Court as follows:

1. Plaintiffs Ewing Gourley and Carol Gourley are husband and wife, residing in the State of Missouri, and are citizens of the State of Missouri, Western District.

2. EBG Health Care III, Inc., EBG Health Care IV, Inc., Healthcare Retirement Village, Inc. and Healthcare Laundry Services, Inc. are all corporations owned and operated by Ewing and Carol Gourley, and are duly organized and existing under and by virtue of the laws in force in the State of Missouri.

3. Defendant Mark E. Gardner is a citizen and resident of the State of Missouri, a licensed attorney, and at all times relevant was practicing with the firm of Carmichael, Gardner, Turner & Brown, P.C. The firm of Carmichael, Gardner, Turner & Brown, P.C. is a professional corporation duly organized and existing under and by virtue of the laws in force in the State of Missouri, doing business in the Western District of Missouri.

4. Mary Beth Usery and Steve Usery are individuals, previously husband and wife, with Mary Beth Usery having been the President and majority shareholder of Central Health Care Centers Inc., at all relevant times, and she is residing in the Western District of Missouri and is a citizen and resident of the State of Missouri.

5. The underlying lawsuits which give rise to this cause of action occurred in the District Courts for the Western District of Missouri and the fraud was perpetrated upon the District Court, and accordingly this Court has original jurisdiction of this matter. All actions occurred in the Western District, and accordingly venue is proper in the Western District of the United States District Court for the Western District of Missouri.

6. By way of background, Plaintiffs purchased certain businesses from the Defendant Userys' Corporation, Central Health Care Centers, Inc., and Plaintiffs thereafter alleged that they were induced to purchase said businesses as a result of fraudulent misrepresentations made by the Userys. Said misrepresentations related to cash flow from the businesses.

7. The original trial was in January and February of 1993 before Bankruptcy Judge Karen M. See. In a bench tried case, the Court ruled in favor of the Gourleys on their cause of action for fraud, and awarded total damages in the sum of $5,470,775.57. This Judgment was entered on April 14, 1995. (See Exhibit 1).

8. On August 26, 1996, Judge Otrie Smith, District Court Judge for the Western District of Missouri, affirmed the Judgment.

9. Thereafter, this Judgment was appealed by the Userys, to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals for the Eighth Circuit issued an Opinion in 1997, wherein it affirmed the Judgment of the trial court as to all issues of liability, but remanded the case for recalculation of damages. (See: 123 F.3d at 1097).

10. Following the remand for the recalculation of damages, Judge See recalculated the damages, and on January 29, 1999 once again entered a Judgment in favor of the Gourleys for $2,280,017.00. (See Exhibit 2).

11. The Userys filed a Motion For A New Trial, and inasmuch as Judge See had retired from the bench, the case was reassigned to Bankruptcy Judge Arthur B. Federman.

12. On March 3, 1999 Judge Federman granted the Userys' Motion For A New Trial.

13. On May 6th a new trial was held on the issue of damages, and on June 3, 1999 Judge Federman entered Judgment in favor of the Gourleys for the sum of $390,854.87. (See Exhibit 3).

14. The Judgment entered on June 3, 1999 by Judge Federman was the result of a fraud perpetrated upon the Court as more specifically set forth hereinafter. As a result of said fraud, Plaintiffs are entitled to equitable relief in having the Judgment set aside and the appropriate Judgment entered or a new trial being conducted.

15. The fraud perpetrated upon the Court consists of the following:

a. Mr. Gardner directly asserted to the Court that the Userys' cash flow representation for the year of 1988 in the amount of $960,000 after servicing existing debts of $4.1 million was the equivalent of $1,236,136 per year before servicing the existing debt. In fact Mr. Gardner knew that this was false and the 1993 trial record was void of any evidence

supporting his assertion and the written evidence in the contract and the trial record of negotiations between the parties showed that the cash flow necessary to service the existing debts of $4.1 million equaled $667,013 per year.

b. Mr. Gardner by fabrication of facts and artifice asserted directly to the court that the 1987 cash flow for Northside nursing home equaling $623,543 was fraudulently misrepresented to the Gourleys as "represented" cash flow and was an annualized figure from a 15 month BK&D audit. In fact Mr. Gardner knew that this was false and that the CPA who prepared the audit had previously testified in the 1993 trial that the number was not from her audit.

c. Mr. Gardner by fabrication of facts and by artifice asserted directly to the court that the 1967 cash flow for the Ozark nursing home equaling $612,593 was fraudulently misrepresented to the Gourleys as "represented" cash flow and was an annualized figure from a 15 month BK&D audit. In fact Mr. Gardner knew that this was false and that the CPA who prepared the audit had previously prepared the audit had previously testified in the 1593 trial that the number was not from her audit.

d. Mr. Gardner by fabrication of facts and by artifice asserted directly to the court that the combined cash flow for the two nursing homes equaling $1,236,136 was annualized from a 15 month BK&D audit. In fact Mr. Gardner knew that this was false and that

the CPA who prepared the audit had previously testified in the 1993 trial that the numbers were not from her audit.

e. Mr. Gardner by fabrication of facts and by artifice directly asserted to the court that the 1985 cash flow for Ozark of $346,927 and for Northside of $470,089 were cash flow representations made by the Userys to the Gourleys and characterized as "represented" cash flow. In fact Mr. Gardner knew that this was false and no evidence existed to support his assertion.

f. Mr. Gardner by fabrication of facts and by artifice directly asserted to the court that the 1985 cash flow for Ozark of $568,611 and for Northside of $525,685 were cash flow representations made by the Userys to the Gourleys when in fact Mr. Gardner knew that this was false and no evidence existed to support his assertion.

g. Mr. Gardner by fabrication of facts and by artifice directly asserted to the court that Usery Exhibit #203 comprised the cash flow numbers advanced by Gourley expert Mr. Lynn at the original trial and was a demonstrative exhibit of the cash flows sponsored by the Gourleys when in fact Usery Exhibit #203 was completely fabricated and authored by Mr. Gardner after the 1993 trial was over and constituted a comparative analysis that Mr. Lynn never made and employed the use of cash flow numbers Mr. Lynn never used.

16. The most glaring misrepresentation perpetrated upon the Court was the use of Usery Exhibit #203, which

totally mislead and deceived the Court. An explanation of how misleading said Exhibit is is more specifically set forth on Exhibit 4 attached hereto and by reference thereto incorporated herein.

17. As a direct and proximate result of the aforesaid fraudulent acts perpetrated upon this Court, all of which were performed knowingly, willfully and intentionally, to mislead this Court, in order to obtain a more favorable Judgment for the Defendants, this Court was in fact misled, and entered its Judgment on June 3, 1999, having reduced the original Judgment of over $2,000,000 to less than $400,000.

18. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs request that equitable relief be entered in their favor, by setting aside the prior Judgment, entering the appropriate Judgment based on the actual facts, rather than the misrepresented facts, conducting a new trial if necessary, conducting further hearings if necessary, for attorney fees and costs, and for such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

ROSENBLUM, GOLDENHERSH,
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

EWING B. GOURLEY, et al.,	)	
Plaintiffs,	)	
	)	**Case No. 01-0073-CV-**
vs.	)	**W-3-ECF**
MARK E. GARDNER, et al.,	)	
	)	
Defendants.	)	

ORDER (1) DENYING PLAINTIFFS' MOTION TO STRIKE AND (2) GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

Defendants Mark E. Gardner and Carmichael, Gardner, Turner & Brown, P.C. filed a Motion to Dismiss or, in the Alternative, for Summary Judgment (Doc. # 7). Defendants Mary Beth Usery and Steve Usery filed similar motions (Doc. # 5 and Doc. # 17, respectively) that explicitly adopt Gardner's and Carmichael, et al.'s arguments. Plaintiffs filed a Motion to Strike, alleging violations of Local Rule 56.1 and Federal Rule 12(b)(6). The Motion to Strike is denied and the Motions to Dismiss are granted.

This case has its genesis in a hotly disputed bankruptcy proceeding. Following a trial, the Honorable Karen M. See, then a bankruptcy judge in this district, issued judgment in an adversary action between Plaintiffs herein and the Usery's, Mark Gardner, and others. Judge See's judgment was issued on April 14, 1995. The undersigned affirmed the judgment on August 26, 1996, and the

Eighth Circuit affirmed in part and remanded for recalculation of damages. *Gourley v. Usery (in re Usery)*, 123 F.3d 1089 (8th Cir. 1997). Judge See recalculated damages, and the Userys filed a Motion for New Trial. Judge See retired from the bench by the time the Motion for New Trial was ready to be ruled, so the case was reassigned to the Honorable Arthur B. Federman, now the Chief Bankruptcy Judge for this district. Judge Federman granted the motion and conducted a new trial, entering judgment on June 3, 1999. The judgment was affirmed by the Bankruptcy Appellate Panel (*Usery v. Gourley (In re Usery)*, 242 B.R. 450 (B.A.P. 8th Cir. 1999) and by the Eighth Circuit. *Usery v. Gourley (In re Usery)*, 242 F.3d 378 (8th Cir. 2000) (unpublished per curiam order). Approximately two months later, Plaintiffs initiated this action alleging that Gardner perpetrated a fraud on the court and asking that the judgment be set aside and a new trial be conducted. Defendants' Motions to Dismiss or, in the Alternative, for Summary Judgment (The "Motions to Dismiss") allege (1) lack of jurisdiction, (2) failure to state a claim upon which relief can be granted, and (3) res judicata.

I. DISCUSSION

A. Plaintiffs' Motion to Strike

Plaintiffs' arguments in favor of their Motion to Strike stem from a single premise: Defendants have impermissibly provided the Court with materials outside of the pleadings. This, they contend, requires (1) converting the Motions to Dismiss into Motions for Summary Judgment, and (2) striking the converted motions because Defendants did not provide "a concise statement of

uncontroverted material facts" set forth in separate paragraphs with references to the record as required by Local Rule 56.1. There are several flaws with Plaintiffs' arguments.

First, Rule 12(b) provides for conversion only if matters outside the pleadings are provided to support a motion to dismiss for failure to state a claim under Rule 12(b)(6). The Court is permitted to consider matters outside the pleadings if a motion to dismiss challenging the Court's subject matter jurisdiction, as permitted by Rule 12(b)(1). *E.g., Deuser v. Vecera*, 139 F.3d 1190, 1191 n.3 (8th Cir. 1998). Thus, any materials that Defendants may have presented can properly be considered in the context Defendants' jurisdictional arguments.

Second, even if the Court were to convert the motions, strict adherence to Local Rule 56.1 would not be required. The only materials outside of the pleadings in this case that have been provided are (1) court decisions made following the Eighth Circuit's remand in 1997 (which may not even be "matters outside the pleading" as contemplated by Rule 12(b)(6) and (2) pleadings and briefs that have been filed during the pendency of the case. As to the former, the court believes that the interests of candor, accuracy and completeness required Plaintiffs to mention the history subsequent to Judge Federman's decision, but the court will not delve further into that matter at this juncture. Local Rule 56.1 is designed to (1) facilitate the non-moving party's ability to respond and (2) present the Court with a clear statement of the arguably uncontroverted facts so that the Court can locate those portions of the record that are relevant to the issues at hand. Under these circumstances, Plaintiffs' suggestion

that they have been prejudiced and are unable to respond due to the "violation" of Local Rule 56.1 is specious at best, and there is not a voluminous record requiring guidance from the parties to assist the Court.

Finally, Rule 12(b)(6) does not require conversion. The rule provides that conversion shall occur if "matters outside the pleading are presented to and not excluded by the court," thereby giving the Court an option as to how best to proceed.

In this case, the Court will consider the supplemental materials in connection with Defendants' jurisdictional argument because, as noted earlier, this is plainly permitted. The Court will not consider the supplemental materials in connnection with Defendants' contention that the Complaint fails to state a claim for which relief can be granted, thereby avoiding the issue of whether conversion would be required. In the context of that argument, the Court's inquiry will focus exclusively on the contents of the Complaint. Finally, in light of the Court's rulings on the 12(b)(1) and 12(b)(6) issues, the Court deems it unnecessary to address Defendants' res judicata argument.

B. Jurisdiction

A motion to set aside a judgment for fraud is permitted by Rule 60(b)(3), but such a motion must be filed within a year of the judgment. Appeals do not toll this time limitation, so a Rule 60(b)(3) motion would be untimely. However, Rule 60(b) specifies that it "does not limit the power of a court to entertain an independent

action to relieve a party from a judgment, order, or proceeding . . . or to set aside a judgment for fraud upon the court." *See also Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998). The problem is that the judgment Plaintiffs seek to have set aside has already been affirmed by a superior court.

In *Griffin v. Federal Deposit Ins. Corp.*, 831 F.2d 799 (8th Cir. 1987), the Eighth circuit tacitly acknowledged the requirement that a party gain consent and authorization from the appellate court before asking a district court to entertain relief from a judgment that had been affirmed. Citing *Geuder, Paeschke & Frey Co. v. Clark*, 288 F.2d 1 (7th Cir.), *cert. denied*, 368 U.S. 826 (1961), the Court of Appeals observed that "[r]easons for requiring leave of the appellate court to commence an independent action include finality of judgments, absence of power in the lower court to change or reverse the mandate of an appellate court, and the rightful concern of the appellate court to protect the integrity of its judgments." 831 F.2d at 802.

The *Griffin* court did not discuss the Supreme Court's decision in *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17 (1976) (per curiam). (For that matter, neither did the parties in this case). There, the Supreme Court denied a request for authorization to file a motion to set aside the judgment in a case that had been affirmed by that court, holding that consent was not necessary. The Court explained that "[l]ike the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district judge is not

flouting the mandate by acting on the motion." 429 U.S. at 18.

The Eighth Circuit briefly addressed *Standard Oil* in *Harris v. Union Elec. Co.*, 846 F.2d 482 (8th Cir. 1988), a case in which the defendant filed a post-judgment motion for credit against the verdict after the direct appeal was final. Relying on *Standard Oil*, the court rejected the plaintiffs' contention that the district court lacked jurisdiction to entertain the motion. The Court of Appeals said that it "agree[d] with the substance of plaintiffs' argument, [but] question[ed] its applicability to this case. The district court did not reduce the amount of the judgment, but merely recognized that the judgment had been partially satisfied by the settlement with the underwriters. We believe that under these facts the district court had jurisdiction to act as it did." 846 F.2d at 484. (Interestingly, *Harris* did not mention *Griffin*).

The parties rely on cases from a variety of jurisdictions, but this Court is bound by the dictates of the Eighth Circuit (and, of course, the Supreme Court). Harmonizing *Standard Oil*, *Harris* and *Griffin* is not impossible, and results in the following legal principle: a district court has jurisdiction to entertain a motion or suit to set aside or alter a judgment previously affirmed on appeal if the motion or suit is predicated on events or facts that were not contained in the original record. However, if the motion or suit relies upon facts or events contained in the record, the rationale of *Griffin* is applicable and the district court cannot alter or set aside the affirmed judgment absent permission from the appellate courts.

The Court now turns to the Complaint. The nature of the alleged fraud upon the court is specified in paragraph fifteen, where seven instances are specified. All relate to instances in which Gardner (who represented all defendants in the bankruptcy proceedings) allegedly misrepresented facts in the record, fabricated facts that were contrary to the evidence, or presented arguments that were not supported by the evidence, all contributing to Judge Federman's failure to properly calculate damages. These allegations do not rely upon facts that are new, changed, or were otherwise unavailable during the proceedings before Judge Federman. Indeed, the issue was specifically raised on appeal. In affirming, the Bankruptcy Appellate Panel stated as follows:

> The bankruptcy court had before it two experts to testify as to the value of the business. It found the Appellees' expert to be more credible both in his testimony and his methodology than Appellants' expert and found that the opinion of Appellants' expert defied common sense. Thus, the court reasonably chose to adopt the findings of one expert rather than the other.

Usery, 242 B.R. at 459.

Having offered nothing new for the Court to consider, the Complaint essentially asks the Court to reconsider the present record in light of Plaintiffs' observations about its contents. This is not the situation described in *Standard Oil* or *Harris*. Plaintiff asks this Court to reconsider the exact same record the appellate courts considered in affirming the initial judgment, and in such a case *Griffin* controls. Absent authorization to proceed

from the Court of Appeals, this Court lacks jurisdiction to entertain Plaintiffs' suit.

C. Failure to State a Claim

A motion to dismiss for failure to state a claim should be granted when it appears that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Davis v. Hall*, 992 F.2d 151, 152 (8th Cir. 1993) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In ruling on a motion to dismiss, the Court is required to view the facts alleged in the complaint in the light most favorable to the Plaintiff.

" 'Fraud on the court, though not easily defined, can be characterized as a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense. A finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself, such as bribery of a judge or jury or fabrication of evidence by counsel, and must be supported by clear, unequivocal and convincing evidence.' " *Landscape Properties, Inc. v. Vogel*, 46 F.3d 1416, 1422 (8th Cir.), *cert. denied*, 516 U.S. 823 (1995) (quoting *Pfizer Inc. v. International Rectifier Corp. (In re Coordinated Pretrial Proceedings in Antibiotic Antirust Actions)*, 538 F.2d 180, 195 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977)). Even if the Complaint's allegations are accepted as true (as they must), Plaintiffs cannot prevail. They do not contend that Gardner falsified evidence; in fact, at every turn they studiously avoid making such a charge. This differentiates this case from, for instance, *Hazel-Atlas Glass Co. v.*

Hartford-Empire Co., 322 U.S. 238 (1944) (scheme by patentee to defraud the court by relying upon an article supposedly written by a disinterested author, but actually written and published by Patentee). Instead, the Complaint alleges that Gardner's argument to the Judge Federman was unsupported by, or contrary to, the evidence that was presented Judge Federman. Ultimately, this argument can be summarized as follows: "Opposing counsel fooled the trial judge, and if he had not done so, based on the record we would have prevailed." This argument should have been (and was) made to Judge Federman and on appeal (as evidenced by the Bankruptcy Appellate Panel's opinion); it alleges trial error, not fraud. Crediting the viability of Plaintiffs' claim would permit every losing litigant to assert "we should have prevailed" as proof of fraud on the court, thereby opening the door to never-ending opportunities to file suits such as this and eliminating any prospect of finality following appeal.

II. CONCLUSION

For the foregoing reasons, the motion to strike is denied and the motions to dismiss are granted. The Court holds that it lacks jurisdiction to entertain this suit. Alternatively, the Court holds that even if it had jurisdiction over the case the Complaint fails to state a claim for which relief can be granted.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: April 23, 2001